

5/25/93

SUBJECT: Barratry, solicitation, unauthorized practice of law

COMMITTEE: Criminal Jurisprudence — favorable, with amendment

VOTE: 8 ayes — Place, Allen, Combs, De La Garza, Greenberg, Solis, Stiles, Talton
0 nays
3 absent — Hartnett, Granoff, Nieto

SENATE VOTE: On final passage, April 29 — voice vote

WITNESSES: None

BACKGROUND: Penal Code sec. 38.12 provides that a person commits the offense of barratry if, with intent to obtain an economic benefit, the person or someone the person has procured, solicits employment to prosecute or defend a suit or to collect a claim. The offense is a class A misdemeanor, punishable by a maximum one year in jail and a \$3,000 fine.

A repeat offense of solicitation of employment is a third-degree felony, with a maximum penalty of 10 years in prison and a \$10,000 fine, if the solicitation occurred in a hospital, funeral establishment, cemetery or scene of an accident, by using an employee of the state or local government or of a hospital or funeral establishment or by impersonating a clergyman, public employee or emergency assistance worker or volunteer. Final conviction is considered a "serious offense" under State Bar disciplinary rules.

DIGEST: SB 1227, as amended, would revise the Penal Code barratry offense and add new provisions regulating the unauthorized practice of law and creating the offense of falsely holding oneself out as a lawyer. It would also allow suspension or revocation of a municipally granted license for conviction of a barratry offense.

Prohibited solicitation under the Penal Code would not apply to advertising through the public media but it would apply to written communication to

prospective clients or their families about particular occurrences or legal problems.

Barratry. The barratry offense would be revised to prohibit a person, with intent to obtain economic benefit, from:

- knowingly instituting a suit or claim the person has not been authorized to pursue;
- soliciting employment in one's own behalf or another, either in person or by telephone;
- paying a prospective client to obtain legal representation;
- paying someone to solicit employment;
- paying a family member of a prospective client to solicit employment; or
- accepting anything of value to solicit employment.

These actions would be third-degree felonies.

Licensed attorneys, chiropractors, physicians, surgeons or other health care professionals would commit an offense if they knowingly financed or invested funds or accepted employment that constituted barratry, unless allowed by professional disciplinary rules. These actions would be third degree felonies.

The listed professionals would commit a class A misdemeanor offense (third degree felony for a repeat offense) if they sent or knowingly permitted to be sent to someone who has not sought their services, a written communication:

- concerning an accident or disaster involving a person or the person's relative sooner than the 31st day after it occurred;
- concerning legal representation when they knew or should have known the person already was represented;
- concerning an arrest or summons sooner than the 31st day after it occurred;
- concerning a lawsuit, including a divorce action, to a person or the person's relative sooner than the 31st day after the suit was filed;
- knowing that an injured person or the person's relative had indicated a desire on a traffic accident report not to be contacted about employment;

- involving coercion, duress, fraud, overreaching, harassment, intimidation or undue influence; or
- containing false, fraudulent, misleading, deceptive or unfair statements or claims.

Falsely holding oneself out as an attorney. Falsely holding oneself out as an attorney for economic gain would be a third-degree felony.

The offense would not apply to those currently licensed to practice law in this or another state or a foreign country who are in good standing with the bars in which they are licensed to practice.

Unauthorized practice of law. The offense of the unauthorized practice of law would be committed by those who, for an economic benefit:

- contract to represent a person on personal causes of action for property damages or personal injury;
- contract to represent these persons on personal injury or property damage matters, but on a contingent fee basis with an attempted assignment of a portion of the cause of action;
- advise persons about their rights or about the merits of making claims for personal injuries or property damages;
- advise persons about whether to accept settlement claims for personal injuries or property damage; or
- contract with a third person to represent an individual in legal proceedings.

The offense would be a class A misdemeanor, carrying a maximum penalty of one year in jail and a \$3,000 fine, unless the person had been previously convicted of the crime, then the offense would be a third-degree felony.

The offense would not apply to those currently licensed to practice law in this or another state or a foreign country who are in good standing with those bars in which they are licensed to practice.

Municipal license revocation. The bill would create another instance in which a judge would have the option of license revocation or suspension under municipal occupational licensing requirements. A judge could also suspend or revoke such a license if the person was convicted of barratry, regardless of whether the sentence was probated, the accusation or indictment dismissed following probation, or the person is pardoned, unless pardoned for proof of innocence.

State Bar rules. Not later than June 1, 1994, the State Bar of Texas would be required to adopt rules governing lawyer advertising and written solicitations to prospective clients.

The bill would take effect September 1, 1993.

**SUPPORTERS
SAY:**

Barratry, or illegal solicitation, has been rarely prosecuted in recent years, and the State Bar has disciplined few for barratry violations. But the bar has begun raising the profile of the offense by establishing a toll free hotline to accept reports on attorneys or their runners who have illegally solicited business. The bar is also trying to educate those who are especially likely to be witnesses to violations, such as ambulance and hospital workers. SB 1227 seeks to clarify the law to cover specific instances of improper solicitation to facilitate prosecution.

In 1989 a truck crashed into a busload of schoolchildren near Mission, killing 21 and injuring 61. Lawyers and their employees rushed to Mission to solicit business from the parents of the deceased and injured children. A similar situation occurred in 1988 when the roof collapsed in a Brownsville store. Incidents like these have angered and outraged lawyers and non-lawyers alike. SB 1227 would place reasonable limits on solicitation as well as professional advertising to prevent illegal solicitation.

A few unethical lawyers have given a bad name to the profession. Unethical attorneys often use police accident report information to solicit business. Law firm clerical workers, tow truck drivers, body shop workers, and police officers are used to bring in information about recent accidents, and are often generously compensated for the information. Persons recently released from jail on bail and those whose spouses have filed for divorce often are targets of solicitation. Attorneys or their "runners" solicit in

hospitals, cemeteries and funeral parlors, causing distress and confusion. Runners have even been known to impersonate Red Cross workers to solicit business from accident victims. Choosing an attorney is an important decision that should not be made while in shock or grief. A one-month moratorium on solicitation would be more than reasonable.

Claims that these provisions are unconstitutional are unfounded. The courts have determined that a waiting period similar to that in SB 1227 can be required to prevent preying on people when they are grieving and vulnerable.

The practice of law by those who are unauthorized to do so is a common problem. Paralegals working independently sometimes cross the line into unauthorized practice, and law clerks and paralegals assisting an attorney may venture to inappropriately advise a client. SB 1227 would provide a needed deterrent.

**OPPONENTS
SAY:**

This bill seeks to criminalize legitimate written communication to convey information. An attorney could spend a year in jail simply for mailing a letter less than 31 days after an incident occurred seeking to provide professional services that a person might desperately need. Unwarranted intrusion and unethical behavior to obtain employment can be regulated under professional conduct standards without adding detailed, constitutionally questionable, prohibitions to the criminal statutes.

NOTES:

Sections 1-3 of the bill are included in HB 2506, which passed the House on April 30 and is pending in the Jurisprudence Committee. HB 2506 also included provisions setting standards for attorney advertising.

The committee amendments would require the State Bar to adopt rules governing lawyer advertising and written solicitations of prospective clients. The amendment also would allow an attorney to contact the victims of an accident or disaster within 31 days of the event if the victims state on the accident form that they consent to be contacted.